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No. 01-1674

In the Supreme Court of the United States

GOLDEN RAINBOW FREEDOM FUND, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service (INS) violated the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, when it interpreted its existing regulations governing the "EB-5" immigrant investor program in precedential adjudicatory decisions.

2. Whether the INS's adherence to its precedential adjudicatory decisions, when determining aliens' compliance with the requirements of the EB-5 program during the aliens' conditional residency in the United States, is an arbitrary and capricious retroactive application of those decisions.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is reprinted at 24 Fed. Appx. 698. The order of the district court (Pet. App. 4-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2001. A petition for rehearing was denied on February 11, 2002 (Pet. App. 9). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 203(b)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. 1153(b)(5), which Congress enacted in 1990 (see Immigration Act of 1990, Pub. L. No. 101-649, § 121(a), 104 Stat. 4987), establishes the so-called "EB-5 program." The EB-5 program offers aliens known as "immigrant investors" a preference for a visa and the possibility of obtaining lawful permanent resident status in the United States. In order to qualify for the EB-5 program, an alien must "seek[] to enter the United States for the purpose of engaging in a new commercial enterprise * * * which the alien has established" and "which will * * * create full-time employment for not fewer than 10 United States citizens or [lawful alien workers]." 8 U.S.C. 1153(b)(5)(A). The alien must have "invested" or be "actively in the process of investing" at least $1,000,000 in the new commercial enterprise, unless the investment is to be made in a "targeted employment area," in which case the investment must be at least $500,000. 8 U.S.C. 1153(b)(5)(A)(ii) and (C)(i)-(ii).

In 1992, Congress required the Secretary of State and the Attorney General to establish an Immigrant Investor Pilot Program, under which an alien may qualify for EB-5 visa status by investing in a regional center in the United States "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Act of Oct. 6, 1992, Pub. L. No. 102-395, § 610(a), 106 Stat. 1874, as amended by Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 402(a), 114 Stat. 1647 (*reprinted in* 8 U.S.C. 1153 note); see 8 C.F.R. 204.6(m) (implementing regulations).

b. Aliens who participate successfully in the EB-5 program may become lawful permanent residents of the United States in two steps. The alien first files with the Immigration and Naturalization Service (INS) an "I-526" visa petition setting forth information about himself and his proposed qualifying investment. See 8 C.F.R. 204.6(a) and (b). If the petition is granted, and if the alien is found eligible for a visa by a United States consular officer, then the alien is admitted (with his dependents) to the United States as a conditional permanent resident.[1]

In order to remove the condition on permanent residency, the alien must file an "I-829" petition with the INS within the 90-day period before the second anniversary of his admission to the United States. See 8 U.S.C. 1186b(a)(1) and (d)(2); see also 8 C.F.R. 216.6. The I-829 petition will be granted if the INS determines that the alien met and sustained the required investment and entrepreneurial activities throughout his conditional residency. See 8 U.S.C. 1186b(d)(1). If the I-829 petition is granted, then the alien receives full permanent resident status as of the second anniversary of his conditional admission to the United States. See 8 U.S.C. 1186b(c)(3)(B); 8 C.F.R. 216.6(d)(1). If, however, the INS determines that the alien did not meet and sustain his obligation to comply with the EB-5 requirements, then the I-829 petition must be denied, the alien's permanent resident status is terminated, and the alien may be placed into removal proceedings in which the INS must show by a preponderance of the evidence that its denial of the I-829 petition was correct. See 8

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[1] An alien whose I-526 petition is denied may appeal that decision to the INS's Administrative Appeals Unit (AAU). See 8 C.F.R. 103.3.

U.S.C. 1186b(c)(3)(C), (c)(3)(D) and (d)(1); 8 C.F.R. 216.6(d)(2).

2. In 1996 and 1997, the number of I-526 petitions filed by aspiring immigrant investors increased sharply, from 356 in Fiscal Year 1995 to 1290 in Fiscal Year 1997. See Supp. E.R. 26. Many of the petitions during this period presented complex arrangements under which organizations based in the United States recruited aliens seeking EB-5 residency to be limited partners, and used the aliens' capital in projects that were controlled by a general partner who was not seeking EB-5 residency benefits. See Supp. E.R. 29-30. Some of those I-526 petitions reflected financial arrangements that appeared to be contrary to the INS's EB-5 regulations set out at 8 C.F.R. 204.6. The INS undertook a review of the situation, and placed a temporary administrative hold on I-526 petitions that presented one or more of the questionable features. See E.R. 21-22; Supp. E.R. 29-30, 39-40.

During the summer of 1998, the INS published and designated as precedent a series of four AAU decisions that addressed substantive issues that had arisen under the EB-5 program.[2] See *In re Soffici*, Interim Dec. No. 3359, 1998 WL 471519 (Exam. Comm. June 30, 1998); *In re Izummi*, Interim Dec. No. 3360, 1998 WL 483977 (Exam. Comm. July 13, 1998); *In re Hsiung*, Interim Dec. No. 3361, 1998 WL 483978 (Exam. Comm. July 31, 1998); *In re Ho*, Interim Dec. No. 3362, 1998 WL 483979

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[2] INS regulations provide that the INS may designate particular AAU decisions to "serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the [INA]. Precedent decisions must be published and made available to the public." 8 C.F.R. 103.3(c).

(Exam. Comm. July 31, 1998). For present purposes, *Izummi* was the most important of the four decisions. The AAU held in *Izummi*, *inter alia*, that an alien has not made a qualifying "invest[ment]" for purposes of satisfying 8 U.S.C. 1153(b)(5) and 8 C.F.R. 204.6(e) if, before the end of his two-year period of conditional residency in the United States, the alien enters into an agreement that grants him the right to sell back to the enterprise the financial interest on which his I-526 petition depended, or that guarantees the alien a return on his financial contribution to the enterprise. Such arrangements, the AAU held, eliminate the risk associated with the alien's equity investment and convert it into a loan from the alien to the enterprise. The AAU further held that an alien who invests in an ongoing limited partnership has not "established" a new commercial enterprise within the meaning of 8 U.S.C. 1153(b)(5)(A)(i) unless the alien shows, in accordance with 8 C.F.R. 204.6(h)(3), that *his own* investment will increase the net worth or the number of employees of the existing business by at least 40%. 1998 WL 483977.

The INS took steps to accommodate aliens who had obtained approval of an I-526 petition before the issuance of *Izummi* and the other "precedent decisions," but whose investment did not comply with those decisions. Such aliens were allowed to file, within 90 days of receiving notice of the Attorney General's intent to terminate their conditional permanent resident status (see 8 U.S.C. 1186b(b)(1)), a new I-526 petition. If the INS approved the new I-526 petition, then the alien would be deemed to have remained in lawful, conditional permanent resident status. And if the alien obtained a new visa, then he could begin a new, two-year period of conditional residency pursuant to his second I-526 petition. See E.R. 151-152.

3. Petitioner is a limited partnership that sought to recruit aliens as EB-5 investors. See Pet. iii, 5-6. In 1996, the INS designated petitioner as a "regional center" under the Immigrant Investor Pilot Program. See Pet. 5; see also 8 C.F.R. 204.6(m)(3). That designation permitted aliens seeking EB-5 visas to file I-526 petitions, as limited partners of petitioner, "for new commercial enterprises located within [petitioner's] project to develop an air cargo and manufacturing facility in Jackson County, Oregon." E.R. 66. The INS specified, however, that its designation of petitioner as a regional center "does not reflect any determination by the [INS] on the merits of individual petitions filed by alien entrepreneurs under the Investor Pilot Program." *Ibid.*

On May 12, 1999, petitioner filed a complaint for injunctive and declaratory relief in the United States District Court for the Western District of Washington. The complaint alleged that, of the 90 immigrant investors who participated in petitioner's partnership and who filed an I-526 petition with the INS, approximately 40 had their petition approved, while approximately 30 petitions were approved but later revoked under the INS's 1998 precedent decisions, and the remaining 20 petitions were denied under the precedent decisions. E.R. 10. Petitioner asked the district court to overturn the four precedent decisions; to direct the Attorney General to approve I-526 and I-829 petitions filed by petitioner's limited partners; and to award petitioner damages and attorney's fees. E.R. 17-18.

The district court granted the INS's motion for summary judgment. Pet. App. 4-7. The district court rejected petitioner's argument that the 1998 precedent decisions were a departure from a consistently expressed prior policy and that the INS therefore was

required, under the Administrative Procedure Act (APA), 5 U.S.C. 553, to undertake a notice-and-comment rulemaking. See Pet. App. 5-7. The INS's approval of certain I-526 petitions filed by petitioner's limited partners, the court held, "simply represented the Agency's prior (short-lived) interpretation of the statute . . . [which] [t]he Agency was free to change." *Id.* at 5 (quoting *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327, 1334 (9th Cir. 1997)). The district court distinguished *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999), in which the District of Columbia Circuit found that an FAA policy could be changed only through a rulemaking. The INS's EB-5 program, the court explained, lacked "the same long-standing history" as the FAA policy at issue in *Alaska Hunters*. Pet. App. 6. The court noted that the EB-5 precedent decisions did not conflict with any "binding decisions regarding the [EB-5] program that set forth a settled course of adjudication." *Ibid.* The district court additionally rejected petitioner's argument that it is unlawful for the INS to apply the holdings of the precedent decisions to aliens who filed an I-526 petition before those decisions were issued. *Id.* at 7.

4. The court of appeals affirmed in an unpublished decision, adopting the reasoning of *R.L. Investment Ltd. Partners* v. *INS*, 273 F.3d 874 (9th Cir. 2001). Pet. App. 2. In *R.L. Investment*, the court of appeals in turn relied upon the decision of the district court in that case (upon which the district court in this case also relied, see *id.* at 5). See 273 F.3d at 874. The district court in *R.L. Investment* rejected a challenge, brought by an EB-5 limited partnership and an individual alien, to the INS's application of its 1998 precedent decisions. See *R.L. Inv. Ltd. Partners* v. *INS*, 86 F. Supp. 2d 1014,

1016 (D. Haw. 2000), aff'd, 273 F.3d 874 (9th Cir. 2001). The district court held in relevant part that, although the precedent decisions represented a departure from positions taken by the INS in unpublished decisions and internal memoranda, those earlier materials carried no precedential weight and did not bind the INS. Thus, the precedent decisions did not "effect[] a change in existing law" and violate the rulemaking requirements of the APA. 86 F. Supp. 2d at 1022, 1024-1025. The court further explained that earlier approvals of I-526 petitions that did not satisfy the requirements stated in the precedent decisions were "mistakes" that did not restrict the INS's ability to enforce what it believed to be the correct interpretation of Section 1153(b)(5) and its own implementing rules. *Id.* at 1024-1025.

Addressing the retroactivity issue raised by the petitioner in this case, but not raised by the plaintiffs in *R.L. Investment*, the court of appeals additionally held in this case (Pet. App. 2-3) that the application of the precedent decisions to aliens who were limited partners of petitioner (including aliens whose I-526 petitions had been approved before the precedent decisions) was not impermissibly retroactive. The court of appeals acknowledged that petitioner and its investors may have "rel[ied] on the non-precedential position of the INS" when they formulated their business arrangements. *Id.* at 3. But the court observed that "there had been no formal determination at the time, and they had to know that any initial [residency] approval was conditional." *Ibid.* Furthermore, "[t]here could be no closure until there had been a second [*i.e.*, I-829] petition for removal of the condition, and a showing of compliance was required at that time." *Ibid.* "The long and short of it," the court of appeals stated, is that the INS "finally acted to prevent a perversion of the [EB-5] program"

and, accordingly, petitioner and its alien limited partners "lost their gamble that [petitioner's] creative financing approach would manage to get through the whole process." *Ibid.*

5. On February 11, 2002, the court of appeals denied petitions for rehearing and rehearing en banc that were filed by petitioner. The panel unanimously denied the rehearing petition, and no judge requested a vote on the en banc petition. Pet. App. 9.

ARGUMENT

The court of appeals' unpublished decision in this case is correct and does not conflict with any decision of this Court or any other court. Further review is not warranted.

1. Petitioner correctly does not suggest that there is any disagreement in the lower courts about the application of the Administrative Procedure Act's requirements to the INS's EB-5 precedent decisions: The Ninth Circuit is the only court of appeals to have considered this specific issue, and it has unequivocally upheld the INS's approach. Nor does petitioner claim that the decision below conflicts with any decision of this Court. See, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99-100 (1995) (holding that interpretive rules may be issued without notice-and-comment rulemaking (see 5 U.S.C. 553(b)(A) and (d)(2)), although rulemaking is required before agency may "adopt[] a new position inconsistent with * * * existing regulations."). Instead, petitioner argues (Pet. 14-22) that there is a disagreement involving three courts of appeals about the general circumstances in which a federal agency, in order to change its interpretation of statutory or regulatory requirements, must employ the notice-and-comment rulemaking procedure of the

Administrative Procedure Act, 5 U.S.C. 553. There is, however, no circuit conflict that bears upon the outcome in this case.

The Ninth Circuit's central holding on the APA issue in this case is that the INS was not required to undertake a notice-and-comment rulemaking in order to depart from positions that had been stated in non-precedential INS decisions and memoranda, which had no binding force. See Pet. App. 2; *R.L. Inv. Ltd. Partners* v. *INS*, 86 F. Supp. 2d 1014, 1024-1025 (D. Haw. 2000), aff'd, 273 F.3d 874 (9th Cir. 2001). That holding is in accord with *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327 (1997), where the Ninth Circuit held that a new agency policy did not have to be published for notice and comment, even though the new policy contradicted recent agency practice. *Id.* at 1333-1338. The Ninth Circuit explained in *Chief Probation Officers* that the earlier practice was not ratified through rulemaking procedures and lacked precedential force and, thus, "[t]he Agency was free to change that interpretation." *Id.* at 1334.

Contrary to petitioner's primary argument (Pet. 14-16), there is no material conflict between the Ninth Circuit's decision in this case and the D.C. Circuit's holding in *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (1999). In the *Alaska Hunters* case, Alaskan fishing and hunting guides challenged an FAA Notice to Operators that required guides who flew passengers to comply with federal commercial-pilot regulations. The Notice reversed an interpretation by the FAA's Alaska regional office, which had for approximately 35 years advised guide pilots that, in light of a 1963 decision by the Civil Aeronautics Board, they were not governed by the commercial-pilot regulations. *Id.* at 1031-1032. The D.C. Circuit

held that the FAA had over the years "given its [commercial-pilot] regulation a definitive interpretation, and later significantly revise[d] that interpretation," such that the FAA had in effect amended its regulations. This, the court held, required a notice-and-comment rulemaking. *Id.* at 1034.

As the D.C. Circuit explained in later cases, its determination that the FAA changed "a definitive interpretation" of its commercial-pilot regulations turned upon the facts that the advice given by FAA personnel in Alaska since the 1960s "was longstanding, uniform, and unambiguous," *Association of Am. R.R.* v. *Department of Transp.*, 198 F.3d 944, 947 (D.C. Cir. 1999), and was based upon a formal adjudication by an associate agency, *Hudson* v. *FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999). As petitioner notes (Pet. 19-21), the Fifth Circuit followed *Alaska Hunters* in *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622 (2001), and held that notice-and-comment procedures must be followed when an agency adopts a new policy that "represents a significant departure from long established and consistent practice that substantially affects [a] regulated industry." *Id.* at 630.[3]

None of the circumstances underlying the *Alaska Hunters* line of cases are present here. Petitioner can identify no binding rule, policy statement, or adjudicatory decision of the INS that establishes that petitioner's investment scheme was consistent with the

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[3] Petitioner also relies (Pet. 17) upon an inapposite passage from *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000). There, the D.C. Circuit simply held that an agency document may be a "final" agency action subject to judicial review if the agency gives the document binding force, notwithstanding that the document was not the product of notice-and-comment procedures. 208 F.3d at 1020-1023.

statutory and regulatory EB-5 requirements.[4] The precedent decisions also did not depart from any long-standing INS policy: The EB-5 program was authorized by Congress in 1990, the Immigrant Investor Pilot Program was authorized in 1992, and the non-binding INS interpretations on which petitioner relies (see Pet. 3-6) date from the mid-1990s—close in time to the 1998 precedent decisions. Unlike the situation in *Alaska Hunters*, the INS's early interpretations of the EB-5 requirements did not find support in any authoritative decision by another agency. Moreover, as the district court and the court of appeals correctly held, the 1998 precedent decisions merely clarified the application of INS regulations to particular EB-5 proposals, and did not deviate from or add new requirements to the regulations.[5] See Pet. App. 5-6 ("[T]he regulations at issue

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[4] The unpublished adjudicatory decisions in which the INS approved I-526 petitions that would have been denied under the later precedent decisions have no precedential authority and did not bind the INS. See *R.L. Investment*, 86 F. Supp. 2d at 1022. Policy memoranda to INS field offices (see Pet. 6), which are not published in the *Federal Register* or officially promulgated, likewise lack the force of law. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The views of INS's General Counsel about the application of EB-5 requirements (see Pet. 3-4) also could not have established a binding policy, because INS regulations do not delegate to the General Counsel any authority to establish binding INS policy. See *R.L. Investment*, 86 F. Supp. 2d at 1022; 8 C.F.R. 100.2(a)(1), 103.1(b)(1); cf. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 743 (1996) (suggesting that published opinion letter of agency's deputy chief counsel was insufficient to establish binding agency policy).

[5] This distinguishes *Pfaff* v. *United States Department of Housing & Urban Development*, 88 F.3d 739 (9th Cir. 1996). See Pet. 18-19. In *Pfaff*, the court of appeals found that the agency had departed from a definitive earlier interpretation that had been

in this case already contained kernels of guidance upon which the [AAU] issued decisions interpreting the language in light of the specific facts of the selected cases before it."); *R.L. Investment*, 86 F. Supp. 2d at 1024 ("The INS was not contravening any statute, regulation, or published decision."). Accordingly, the district court, affirmed by the court of appeals, correctly rejected petitioner's assertion that the precedent decisions reversed a "consistent expression of agency policy." Pet. App. 6 (quoting petitioner's brief); see *R.L. Investment*, 86 F. Supp. 2d at 1024-1025. The factual predicate underlying the decision in *Alaska Hunters* is absent in this case.

2. Petitioner additionally contends that applying the precedent decisions to aliens whose I-526 petitions had been approved constitutes an impermissible retroactive application of the decisions and, therefore, is arbitrary and capricious in violation of the APA.[6] Pet. 22-25. The court of appeals correctly rejected this argument as well. Pet. App. 3.

The court of appeals observed that "retroactivity is the rule in adjudication" (Pet. App. 3), because an ad-

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announced in the *Federal Register* after a notice-and-comment rulemaking proceeding. 88 F.3d at 748.

[6] Petitioner asks this Court to "bar the application of [the precedent] decisions to petitioner's investors who are in the process of petitioning for the removal of their conditional status." Pet. 22. The petitioner partnership, however, lacks standing to request relief on behalf of individual investors who have never been parties to this case. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party."). The court of appeals held only that petitioner "has standing to assert i[t]s own claim for harm that it has allegedly suffered by reason of the position of the INS." Pet. App. 2.

judicator generally makes a determination about the legal consequences of past conduct. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). As the court of appeals also noted (Pet. App. 3), petitioner could not have believed, based upon any binding interpretation by the INS, that its limited partnership arrangements satisfied the requirements of the EB-5 program: Before 1998, "there had been no formal determination" of the relevant issues. Moreover, limited partners of petitioner whose I-526 petitions were granted received only *conditional* permanent resident status, subject to their *future* showing of compliance with the EB-5 requirements in an I-829 petition. See 8 U.S.C. 1186b(c)(3)(C); see 8 C.F.R. 216.6(d)(2). Petitioner and its limited partners thus could not reasonably have pursued EB-5 benefits in the belief that the INS's past approval of an I-526 petition would prevent the INS from applying subsequent interpretations of 8 U.S.C. 1153(b)(5) and INS regulations in *future* I-829 proceedings. Indeed, the INS's application of the EB-5 precedent decisions in I-829 proceedings does not constitute a retroactive application of those decisions at all, because the alien's failure to comply with the EB-5 requirements *at any time* during the period of conditional residency—including at times after issuance of the precedent decisions—is grounds for rejecting an I-829 petition. See 8 U.S.C. 1186b(c)(3) and (d)(1)(C).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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